

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 52191-8-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
ROGER SCOTT BOYD,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>August 28, 2006</u>
)	
)	

COX, J. -- Any fact other than that of a prior conviction that increases the applicable punishment must be found by a jury beyond a reasonable doubt, unless the defendant either stipulates to it or waives his constitutional right to a jury finding of the fact.¹ Here, Roger Boyd did not waive his right to a jury finding of facts that increased his sentence. Accordingly, the exceptional sentence imposed in this case violates Boyd's Sixth Amendment rights. We vacate the sentence and remand for re-sentencing within the standard range.

On March 7, 2005, we filed our opinion in this case, affirming Boyd's judgment and sentence. The supreme court granted his petition for review on the sentencing issue only and remanded the case to us for reconsideration in

¹ State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005) (citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)), overruled on other grounds by Washington v. Recuenco, 126 S. Ct. 2546, 2550 (2006).

light of State v. Hughes.² We now reverse the exceptional sentence and remand for sentencing within the standard range.

The relevant facts and procedural history are set forth in our prior opinion, and we will not repeat them here.³

In Hughes, the supreme court held that the exceptional sentences imposed in the three cases then before the court violated the Sixth Amendment right to a jury trial.⁴ The court also held that harmless error analysis is inapplicable to such a violation and that re-sentencing must be done within the standard range when such violations occur.⁵ The question before us is whether Boyd's exceptional sentence also violates the Sixth Amendment.

At sentencing, the court determined that Boyd's offender score was 24 and the standard range for such a score was 51-68 months. But the court relied on certain aggravating factors to impose the exceptional sentence. Specifically, the court relied on Boyd's unscored prior misdemeanors and the similarity of those crimes to his current conviction to increase his sentence.

The supreme court held a similar procedure invalid in Hughes. There, Hughes was convicted of first degree theft based on his cutting down old growth cedar trees.⁶ At trial, an expert testified that the trees were worth \$4,465.

² 154 Wn.2d 118.

³ State v. Boyd, 2005 Wash. App. LEXIS 413 (2005).

⁴ Hughes, 154 Wn.2d at 126.

⁵ Id. at 156.

⁶ Id. at 129.

⁷ But at sentencing, another expert testified that, based on both monetary and ecological components, they were worth \$145,599.⁸ The court imposed an exceptional sentence based on the statutory factors in the SRA of “rapid recidivism” and “ongoing pattern of the same criminal conduct.”⁹

In rejecting the State’s argument that these criteria were limited to the fact of prior convictions and thus within the Appendi¹⁰ exception, the court identified prior case authority on the first of the two factors, noting that rapid recidivism had been recognized as a valid aggravating factor. But the court viewed the “ongoing pattern of the same criminal conduct,” the second factor, differently. The court noted that under Washington law, reliance solely on the prior criminal history could not have supported the imposition of an exceptional sentence.¹¹ The court concluded that the factor necessarily considered the “combination of the various similar offenses and the heightened harm or culpability that pattern indicates.”¹² According to the court, this determination implicitly involves factual findings beyond the fact of prior convictions. Thus, under Blakely, such findings are for a jury.

⁷ Id.

⁸ Id.

⁹ Id. at 129-30.

¹⁰ Appendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

¹¹ Hughes, 154 Wn.2d at 135.

¹² Id. at 142.

We can find no rational basis on which to distinguish the procedure here from that rejected in Hughes. The trial court noted that Boyd has a substantial number of unscored misdemeanors. But the court went beyond that. It also determined that the misdemeanors were so similar to the current crime that the sentence was clearly too lenient. This determination, like that in Hughes, necessarily considered the combination of the various similar offenses and the heightened harm or culpability the pattern indicates. Thus, it invaded the province of the jury for Sixth Amendment purposes. Accordingly, the sentence cannot stand.

Hughes also makes clear that the proper remedy is re-sentencing within the standard range.

Accordingly, we vacate the exceptional sentence and remand this case for re-sentencing within the standard range.

Cox, J.

WE CONCUR:

Becker, J.
